

ORIGINAL



JOHN F. MUNGER
MARK E. CHADWICK *
MICHAEL S. GREEN
KATHLEEN DELANEY WINGER
EVELYN PATRICK BOSS **
LAURA P. CHIASSON
JAMES D.V. STEVENSON

* Also Admitted in Colorado
** Also Admitted in Washington State

MICHAEL M. RACY (NON-LAWYER)
GOVERNMENT RELATIONS DIRECTOR
DIRECT LINE: (520) 906-4646

MEREDITH LEYVA (NON-LAWYER)
PUBLIC RELATIONS MANAGEMENT

MUNGER CHADWICK, P.L.C.

ATTORNEYS AT LAW
A PROFESSIONAL LIMITED LIABILITY COMPANY
NATIONAL BANK PLAZA
333 NORTH WILMOT, SUITE 300
TUCSON, ARIZONA 85711
(520) 721-1900
FAX (520) 747-1550
MungerChadwick.com

PHOENIX APPOINTMENT ADDRESS:
5225 N. CENTRAL
SUITE 235
PHOENIX, ARIZONA 85012-1452
(602) 230-1850

LAWRENCE V. ROBERTSON, JR.
ADMITTED TO PRACTICE IN:
ARIZONA, COLORADO, MONTANA,
NEVADA, TEXAS, WYOMING,
DISTRICT OF COLUMBIA

OF COUNSEL
MILLER, LA SOTA AND PETERS, P.L.C.
PHOENIX, ARIZONA

OF COUNSEL
OGARRIO Y DIAZ ABOGADOS
MEXICO, D.F., MEXICO
(LICENSED SOLELY IN MEXICO)

November 29, 2001

Nancy Cole, Supervisor
Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

**Re: Arizona Public Service Company
Docket No. E-01345A-01-0822**

RECEIVED
2001 DEC -3 A 11:19
AZ CORP COMMISSION
DOCKET CONTROL

Dear Ms. Cole:

Enclosed for filing are the original and 10 copies of Toltec Power Station, LLC's Comments Supporting Request For Procedural Conference. Copies have been sent to all parties of record. Enclosed also, are two additional copies to be conformed and returned to our office.

Thank you for your assistance.

Sincerely,

Lawrence V. Robertson, Jr.

LVR:cl

enclosure

Arizona Corporation Commission
DOCKETED
DEC 03 2001

DOCKETED BY	
-------------	--

Lawrence V. Robertson, Jr. (001709)
MUNGER CHADWICK, P.L.C.
National Bank Plaza
333 N. Wilmot, Suite 300
Tucson, Arizona 85711
(520) 721-1900; Facsimile (520) 747-1550
E-Mail: lvrobertson@mungerchadwick.com
Attorneys for: Toltec Power Station, L.L.C.

RECEIVED

2001 DEC -3 A 11: 20

AZ CORP COMMISSION
DOCUMENT CONTROL

BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE ARIZONA) Docket No. E-01345A-01-0822
PUBLIC SERVICE COMPANY'S)
REQUEST FOR A VARIANCE OF) COMMENTS SUPPORTING REQUEST FOR
CERTAIN REQUIREMENTS OF A.C.C.) PROCEDURAL CONFERENCE
R14-2-1606)
_____)

By means of this filing, Southwestern Power Group II, L.L.C. ("SWPG"), Toltec Power Station, L.L.C. ("Toltec") and Bowie Power Station, L.L.C. ("Bowie") hereby express their support of and joinder in the Request for Procedural Conference filed in the above-captioned matter by the Arizona Competitive Power Alliance ("ACPA").¹ A copy of that filing is attached hereto as Appendix "A" and is incorporated herein by reference.

As ACPA's filing observes, there are several reasons why a procedural conference should be conducted before any other procedural events or dates are established. First, there is the threshold question of whether Arizona Public Service Company's ("APS") Request for Variance is a proper subject for a variance pursuant to A.A.C. R14-2-1614(C). One or more parties may wish to fill Motions to Dismiss in that regard. A procedural conference at the outset would allow the Chief Hearing Officer to (i) determine the likelihood of such an occurrence, and (ii) establish a schedule and process for addressing and resolving the same.

¹ SWPG, Toltec and Bowie were granted intervention in the instant proceeding in a Procedural Order issued by the Chief Hearing Office on November 28, 2001.

1 Second, it is readily apparent that there is significant divergence of views between APS and
2 ACC staff as to the nature and scope of issues raised by APS's Request for Variance. Other parties
3 may have different viewpoints as well as to what the scope of the proceeding should be, and how
4 it should be structured. A procedural conference at this juncture provides the Chief Hearing Officer
5 an opportunity to receive an expression of the views of the various parties at one time, rather than
6 receiving them in piecemeal fashion over time through a series of motions or written comments.
7

8 Third, as both ACC Staff and ACPA observe, APS has yet to submit any evidence in support
9 of the allegations on which its Request for Variance is predicated. A process needs to be established
10 for allowing ACC Staff and other parties to test APS's evidence, and to offer their own. Similarly,
11 there should be an opportunity for the offer and testing of rebuttal evidence. A procedural
12 conference represents a logical first step in establishing both a schedule and the constituent phases
13 of a process through which such objectives could be achieved and due process served.
14

15 Accordingly, for these reasons and the discussion set forth in ACPA's filing, SWPG, Toltec
16 and Bowie support ACPA's request for the prompt scheduling of a procedural conference in the
17 above-captioned proceeding.
18

19 DATED: November 29, 2001.

20 Respectfully submitted,

21
22
23 By: Lawrence V. Robertson, Jr.
24 Lawrence V. Robertson, Jr.
25 Attorney for Semptra Energy Sources
26
27
28

1 Original and ten (10) copies
2 mailed this 29th day of November,
3 2001, to:

4 Docket Control
5 Arizona Corporation Commission
6 1200 W. Washington St.
7 Phoenix, Arizona 85007

8 Copy of the foregoing
9 sent via facsimile and mailed
10 this 29th day of November, 2001 to:

11 Lynn Farmer
12 Chief Administrative Law Judge
13 Hearing Division
14 Arizona Corporation Commission
15 1200 W. Washington St.
16 Phoenix, Arizona 85007

17 A copy of the of the foregoing
18 was mailed on this 29th day of
19 November, 2001, to:

20 Thomas L. Mumaw
21 Jeffery B. Guldner
22 Snell & Wilmer
23 One Arizona Center
24 400 E. Van Buren
25 Phoenix, Arizona 85004-2202
26 Attorneys for APS

27 Christopher Kempley
28 Chief Counsel
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Scott Wakefield
Residential Utility Consumer Officer
2828 N. Central, Suite 1200
Phoenix, Arizona 85004

1 C. Webb Crockett
2 Jay L. Shapiro
3 FENNEMRE CRAIG
4 3003 North Central Avenue
5 Suite 2600
6 Phoenix, Arizona 85012-2913
7 Attorneys for Reliant Resources, Inc.
8 and Panda Gila River, L.P.

9 Greg Patterson
10 Arizona Competitive Power Alliance
11 2345 West Roosevelt
12 Phoenix, Arizona 85003

13 Roger K. Ferland
14 Quarles & Brady Streich Lang LLP
15 Renaissance One
16 Two North Central Avenue
17 Phoenix, AZ 85004-2391
18 Attorneys for PG&E Natural Energy Group

19 Walter W. Meek, President
20 Arizona Utility Investors Association
21 2100 N. Central Avenue, Suite 210
22 Phoenix, Arizona 85004

23 Steven J. Duffy
24 RIDGE & ISAACSON, P.C.
25 3101 N. Central Ave., Suite 1090
26 Phoenix, Arizona 85012
27 Attorneys for Duke Energy North America, LLC
28 and Duke Energy Arlington Valley, LLC



APPENDIX "A"

1 ARIZONA COMPETITIVE POWER ALLIANCE

2 Greg Patterson

245 West Roosevelt

Phoenix, Arizona 85003

Telephone: (602) 229-1010

BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE ARIZONA
PUBLIC SERVICE COMPANY'S
REQUEST FOR A VARIANCE OF
CERTAIN REQUIREMENTS OF A.C.C.
R14-2-1606

Docket No. E-01345A-01-0822

REQUEST FOR PROCEDURAL
CONFERENCE

Before the Commission takes any further action concerning the Request of Arizona Public Service Company for a Partial Variance to A.A.C. R14-2-1606(B) and for Approval of a Purchase Power Agreement (hereinafter the "Variance Request"), Intervenor, Arizona Competitive Power Alliance¹ (the "Alliance"), respectfully requests that the Hearing Division schedule a Procedural Conference to address, with input from all parties, the scope of the issues to be considered in this docket, the nature and timing of the proceedings necessitated by the Variance Request and APS' continued compliance with A.A.C. R14-2-1601 *et seq.* (the "Electric Rules) and prior Commission orders, including the decision approving the APS Settlement Agreement, during the period that this matter is being resolved. Holding such a conference at this time will promote the orderly consideration of APS' request and aid the Commission in ensuring that all parties are afforded due process. *See, e.g.,* Reply of APS to Response of Commission Staff ("APS Reply") at 1, 11; Staff's Response at 8.

¹ Arizona Competitive Power Alliance is a coalition in support of competition and includes Allegheny Energy Supply, Caithness Energy L.L.C., Calpine, Duke Energy North America, LLC, Gila Partners, Mirant Americas, Inc., Panda Energy International, Inc./Teco Power Services Corporation, PG&E National Energy Group, PPL Montana, LLC, Reliant Energy, Semptra Energy Resources and Southwestern Power Group II, LLC.

1 **I. The Need for a Procedural Conference is Paramount.**

2 APS would have the Commission believe that it seeks nothing more than a temporary and
3 inconsequential adjustment to the structure of electric competition in Arizona. *See, e.g.,* APS
4 Reply at 2 (APS seeks “only a variance to one subsection of one” of the 17 Electric Rules). This
5 is akin to claiming that removal of a heart, simply one, relatively-small organ, will have little
6 impact on the whole body. The Variance Request threatens the very viability of electric
7 competition in Arizona by seeking to remove its heart—the requirement that 100% of generation
8 for standard offer customers be obtained from the competitive market. APS’ effort to minimize
9 the impact of the relief it seeks must be rejected.

10 In fact, the Alliance questions whether the relief APS seeks is the proper subject of a
11 variance pursuant to A.A.C. R14-2-1614(C). If granted, the Variance Request would alter the
12 nature of competition for the largest electric consumer base in Arizona. The Alliance believes
13 such relief is not only inconsistent with the Electric Rules, it is also a violation of the APS
14 Settlement Agreement and the Commission decision approving that agreement.² Accordingly,
15 one topic to consider at the Procedural Conference is how the Commission should determine the
16 validity of the Variance Request as a matter of law.

17 Additionally, and in stark contrast to APS, which seeks to narrow the scope of the
18 Commission’s adjudication in this docket, Staff appears to seek to utilize APS’ filing as a vehicle
19 to revisit the Electric Rules as well as apparently every prior decision of the Commission in
20 connection with deregulation. The Alliance shares Staff’s concern that the magnitude of the relief
21 APS seeks calls into question several crucial elements of the regulatory structure for
22 implementing competition, including, among other issues, stranded cost recovery, divestiture and
23 transmission capacity. These are issues that may well have to be considered to adequately
24 evaluate the Variance Request. This does not mean, however, nor does the Alliance believe that

25 ² The APS Settlement explicitly provides that “[a]fter the extensions granted in this [Agreement] have
26 expired, APS shall procure generation for Standard Offer customers from the competitive market as
 provided for in the Electric Competition Rules.” Addendum to Settlement Agreement at 4.1(3).

1 a midstream review and/or wholesale revision of every aspect of the Electric Rules is warranted.

2 For one thing, in express reliance on the current Electric Rules and prior Commission
3 decisions, members of the Alliance have already invested billions of dollars in Arizona.
4 Moreover, unlike the "horror" stories cited by APS from other states, the Commission's structure
5 for electric competition has worked. Arizona's electric consumers have already realized
6 significant benefits from deregulation through rate freezes and rate reductions. Accordingly, a
7 Procedural Conference is necessary to frame and limit the scope of the issues that need to be
8 addressed in this docket.

9 Next, as Staff correctly recognized, APS' request is based on little more than a string of
10 unsupported and conclusory allegations concerning, among other things, the availability and
11 reliability of competitive generation, pricing stability, and the practicality of compliance with
12 A.A.C. R14-2-1606(B). Staff Response at 5-6. Unless the Commission determines that the
13 Variance Request should be summarily denied or dismissed, APS bears the burden and therefore,
14 must produce evidence to support the bare allegations offered in connection with the Variance
15 Request. In the event APS can produce such evidence, the other parties must be given time to
16 conduct discovery and an opportunity to submit evidence to demonstrate that the Variance
17 Request should not be granted. Therefore, a procedural schedule is one of the topics to address at
18 the Procedural Conference.

19 Finally, the Alliance is particularly concerned over APS' apparent belief that it can
20 unilaterally decide to cease compliance with the Electric Rules, and prior Commission orders,
21 including the order approving the APS Settlement Agreement, pending a decision on the Variance
22 Request. The Commission has already determined that requiring APS to procure 100% of its
23 generation for Standard Offer service from the competitive market, including 50% through a
24 competitive bidding process, is in the public interest. *See, e.g.,* Decision No. 61969 (Sept. 29,
25 1999). Until the Commission reverses that decision, amends the Electric Rules and approves a
26 modified settlement, APS must remain in compliance with prior Commission orders and the

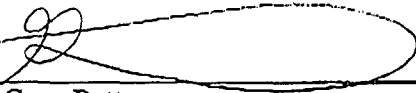
1 Electric Rules, including, without limitation, A.A.C. R14-2-1606.B, which will likely require
2 APS to begin the process of procuring power from the market while this docket is pending.³
3 Ensuring such compliance is another topic that needs to be addressed in a Procedural Conference.

4 **II. Relief Requested.**

5 As demonstrated herein, there are a number of critical procedural issues that must be
6 addressed before the scope, nature and timing of the proceedings in this docket can be
7 established. Consequently, for the reasons set forth herein, the Alliance hereby requests that the
8 Hearing Division promptly schedule a Procedural Conference so these issues can be discussed
9 and a Procedural Order governing this docket can be issued following the Procedural Conference.

10 DATED this 29th day of November, 2001.

11 ARIZONA COMPETITIVE POWER
12 ALLIANCE

13 By 
14 Greg Patterson

15
16
17 Original and 10 copies
18 hand-delivered this 29th
day of November, 2001 to:

19 Docket Control
20 Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

21 Copy of the foregoing
22 hand-delivered this 29th
day of November, 2001 to:

23
24 ³ While the Alliance shares Staff's concern over APS' divestiture of generation assets if APS is no longer
25 going to obtain power from the competitive market (Staff Response at 2-3), APS has represented that
26 divestiture will not occur until the Commission renders a decision on the Variance Request. APS Reply at
5. Therefore, compliance by APS with this requirement should be stayed pending a decision in this
docket.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Lyn Farmer
Chief Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

Chris Kempley, Chief Counsel
Legal Division
Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

And a copy mailed this 2nd day
of November, 2001, to:

Thomas L. Mumaw, Esq.
Jeffrey B. Guldner, Esq.
Snell & Wilmer
One Arizona Center
Phoenix, Arizona 85004-2202
Attorneys for APS

Scott Wakefield, Esq.
Residential Utility Consumer Officer
2828 N. Central, Suite 1200
Phoenix, AZ 85004

By _____
1247651.1